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Nos. 98-1024 and 98-6523

In the Supreme Court of the United States

OCTOBER TERM, 1998

MARTIN KING, PETITIONER

v.

UNITED STATES OF AMERICA

ALFRED SMITH AND EUGENE SMITH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 844(h)(1) (1994), which at the time of petitioners' offenses established a mandatory minimum term of five years' imprisonment for any person who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States," such penalty to run consecutive to any other term of imprisonment, was properly applied to a conspiracy under 18 U.S.C. 241 (1994) to burn crosses in order to threaten or intimidate individuals in their exercise of rights secured by federal law.

2. Whether petitioners' convictions violated their rights under the First Amendment.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Boos v. *Barry*, 485 U.S. 312 (1988)	8-9
Connecticut Nat'l Bank v. *Germain*, 503 U.S. 249 (1992)	5
Hartbarger v. *United States*, 148 F.3d 777 (7th Cir. 1998), petition for cert. pending, No. 98-6559 (filed Oct. 16, 1998)	5
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992)	8
Rankin v. *McPherson*, 483 U.S. 378 (1987)	8
Roberts v. *United States Jaycees*, 468 U.S. 609 (1984)	9
Rubin v. *United States*, 449 U.S. 424 (1981)	5
Runyon v. *McCrary*, 427 U.S. 160 (1976)	9
Salinas v. *United States*, 118 S. Ct. 469 (1997)	5
Toussie v. *United States*, 397 U.S. 112 (1970)	6-7
United States v. *Gonzales*, 520 U.S. 1 (1997)	5, 6
United States v. *Hayward*, 6 F.3d 1241 (7th Cir. 1993), cert. denied, 511 U.S. 1004 (1994)	4, 7
United States v. *Lee*, 935 F.2d 952 (8th Cir. 1991), vacated in part on other grounds, 6 F.3d 1297 (1993), certs. denied, 511 U.S. 1035 and 1046 (1994)	4
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940)	7
United States v. *Wells*, 519 U.S. 482 (1997)	7

Cases—Continued: Page

United States v. *Wildes*, 120 F.3d 468 (4th Cir. 1997), cert. denied, 118 S. Ct. 885 (1998) 3, 4, 5
Wisconsin v. *Mitchell*, 508 U.S. 476 (1993) 9, 10
U.S. Const.:
Art. III, § 2, Cl. 3 7
Amend. I 8, 9
Amend. VI 7
Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. VII, § 708(a)(3)(A), 110 Stat. 1296 2
18 U.S.C. 241 (1994) 2, 3, 4, 5, 6, 8, 9
18 U.S.C. 844(h) (Supp. II (1996)) 2
18 U.S.C. 844(h) (1994) 2
18 U.S.C. 844(h)(1) (1994) 2, 3, 4, 5, 6, 8, 9
18 U.S.C. 924(c) 5
42 U.S.C. 3631(a) 2

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OPINION BELOW

The opinion of the court of appeals (98-1024 Pet. App. 1-4) is not reported, but the judgment is noted at 161 F.3d 5 (Table).

JURISDICTION

The judgment of the court of appeals was entered on July, 17, 1998. The petitions for a writ of certiorari were both filed on October 15, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioners were convicted of conspiracy to threaten or intimidate persons in the exercise of their federally protected rights, in violation of 18 U.S.C. 241;[1] using fire to commit a felony (here, the civil rights conspiracy), in violation of 18 U.S.C. 844(h)(1); and intimidation of and interference with persons because of their race and their occupation of a dwelling, in violation of 42 U.S.C. 3631(a). Each petitioner was sentenced to the mandatory minimum term of five years' imprisonment for his violation of 18 U.S.C. 844(h)(1).[2] For the other offenses, petitioner King was

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[1] Section 241 establishes criminal penalties of up to ten years' imprisonment in cases where "two or more persons conspire to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same."

[2] At the time of the criminal conduct involved in this case, Section 844(h) required that any person who "uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States * * * shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 5 years but not more than 15 years." 18 U.S.C. 844(h) (1994). Section 844(h) was amended in 1996, see Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. VII, § 708(a)(3)(A), 110 Stat. 1296, to provide that such persons should receive a mandatory term of 10 years' imprisonment. 18 U.S.C. 844(h) (Supp. II 1996). Both before and after the 1996 amendment, Section 844(h) has required that the applicable term of imprison-

sentenced to an additional 12 months' imprisonment, petitioner Alfred Smith was sentenced to an additional 21 months' imprisonment, and petitioner Eugene Smith was sentenced to an additional 120 months' imprisonment. The court of appeals affirmed. 98-1024 Pet. App. 1-4.

1. Petitioners lived in a rural area in Haywood, North Carolina. Gordon Cullins, an African-American male, and Hazel Sutton, a white female, lived together across the street from petitioners. Petitioners were unhappy about the presence of a mixed-race couple in the neighborhood. Petitioners decided to burn crosses on the front lawn of Cullins and Sutton in order to frighten the couple so that they would move from the area. Petitioners Alfred Smith and King tied rags and poured kerosene on the crosses. Petitioners drove the crosses to the victims' home, where they planted and ignited the crosses on the front lawn. When Cullins and Sutton returned to their home, they found the crosses smoldering on the lawn. Petitioners and others were across the street shouting racial slurs and threats. 98-1024 Pet. App. 3.

2. The court of appeals affirmed petitioners' convictions and sentences on all three counts. 98-1024 Pet. App. 1-4. Relying on its prior decision in *United States* v. *Wildes*, 120 F.3d 468 (4th Cir. 1997), cert. denied, 118 S. Ct. 885 (1998), the court held that 18 U.S.C. 844(h)(1) applies to cross-burnings that violate 18 U.S.C. 241. 98-1024 Pet. App. 3-4. The court explained that "§844(h)(1) contain[s] clear and unambiguous language" encompassing "an offense of any kind that is punishable by a term of imprisonment for more than one year." *Id.*

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ment run consecutively to any other term of imprisonment, including the term imposed for the underlying felony.

at 4 (quoting *Wildes*, 120 F.3d at 470). Therefore, the court held, "the phrase 'any felony' as used in §844(h)(1) . . . includes conspiracy to violate civil rights by burning a cross." 98-1024 Pet. App. 4 (quoting *Wildes*, 120 F.3d at 470).

Petitioners also contended that their convictions pursuant to Section 844(h)(1) violated their First Amendment rights. Because petitioners had not raised that argument in the district court, the court of appeals stated that the claim was "not reviewable * * * absent plain error or fundamental miscarriage of justice." 98-1024 Pet. App. 4. The court of appeals held that petitioners had not satisfied that standard and accordingly affirmed the convictions and sentences. *Ibid.*

ARGUMENT

The decision of the court of appeals is correct and does not warrant review by this Court. The Court has twice denied petitions for certiorari presenting the question whether Section 844(h)(1) applies to cross-burnings that are prosecuted as felonies under 18 U.S.C. 241. The first time a petition was filed, the United States suggested that the Court grant certiorari to resolve the conflict between the Seventh Circuit's decision in *United States* v. *Hayward*, 6 F.3d 1241 (1993), cert. denied, 511 U.S. 1004 (1994), and that of the Eighth Circuit in *United States* v. *Lee*, 935 F.2d 952, 958 (1991), vacated in part on other grounds, 6 F.3d 1297 (1993), certs. denied, 511 U.S. 1035 and 1046 (1994). The Court denied the petitions in both *Hayward* and *Lee*. Last Term, the Court denied another petition for certiorari in a case presenting the same question. *United States* v. *Wildes*, 120 F.3d 468, 469-471 (4th Cir. 1997),

cert. denied, 118 S. Ct. 885 (1998). There is no reason to reach a different result in the instant case.[3]

1. Petitioners argue (98-1024 Pet. 4-8; 98-6523 Pet. 4-8) that Congress did not intend Section 844(h)(1) to apply to cross-burnings that violate 18 U.S.C. 241. Section 844(h)(1), however, unambiguously covers the criminal conduct for which petitioners were convicted.

The starting point for analysis of a statute has always been the plain meaning of the text. When "the words of a statute are unambiguous, * * * this first canon is also the last." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). "When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition." *Salinas* v. *United States*, 118 S. Ct. 469, 476 (1997).

a. In *United States* v. *Gonzalez*, 520 U.S. 1 (1997), the Court construed the requirement in 18 U.S.C. 924(c) that a term of imprisonment imposed for a violation of that Section shall not run concurrently with "any other term of imprisonment." The Court interpreted that provision to apply to state as well as federal terms of imprisonment. The Court explained that "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" 520 U.S. at 5. Because "Congress did not add any language limiting the breadth of that word," the Court found "no basis in the text for limiting § 924(c) to federal sentences." *Ibid.* The Court further observed that "[g]iven the straightforward statutory

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[3] A petition for a writ of certiorari has also been filed in *Hartbarger* v. *United States*, No. 98-6559, which presents the same issue. The government filed its brief in opposition to that petition on December 21, 1998.

command, there is no reason to resort to legislative history." *Id.* at 6.

Section 844(h)(1) is similarly unambiguous. By its terms, it criminalizes the use of fire to commit "any felony which may be prosecuted in a court of the United States." Restriction of Section 844(h)(1) to a subset of federal felonies is inconsistent with Congress's use of the word "any" and with this Court's decision in *Gonzalez*. Even assuming that Congress in enacting Section 844(h)(1) did not focus on that Section's potential application to civil rights conspiracies (see 98-1024 Pet. 6; 98-6523 Pet. 6), Congress employed language that unambiguously covers those crimes.

b. Petitioners contend (98-1024 Pet. 9-15; 98-6523 Pet. 8-13) that they did not "use[] fire * * * to commit" the underlying felony–*i.e.*, the violation of 18 U.S.C. 241–because the civil rights conspiracy was completed when they entered into the agreement. That claim is without merit.

Count One of the indictment in this case charged petitioners with conspiring to "threaten and intimidate" their victims by "burn[ing] crosses in front of [their] mobile home." 98-1024 Pet. App. 14. The indictment specified that "[i]n furtherance of the conspiracy and to accomplish its objectives * * * [petitioner] Alfred Smith * * * set the crosses on fire." *Id.* at 14-15. Because petitioners do not dispute the sufficiency of the evidence (98-1024 Pet. 2; 98-6523 Pet. 2) or claim that they could have achieved the object of their agreement without igniting the crosses, they "use[d] fire * * * to commit" the underlying civil rights violations.

The fact that petitioners could have violated the civil rights conspiracy statute simply by *agreeing* to ignite the crosses, without actually carrying that plan into effect, does not dictate a contrary conclusion. Con-

spiracy is an ongoing offense that "continues as long as the conspirators engage in overt acts in furtherance of their plot." *Toussie* v. *United States*, 397 U.S. 112, 122 (1970). This Court has held that a conspiracy offense may be prosecuted in any district where an overt act in furtherance of the conspiracy took place, even under a statute (the Sherman Act) that does not require the performance of an overt act as an element of the offense. See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 224-225 n.59, 252-253 (1940). That holding necessarily implies a determination that the offense of conspiracy is "committed" in every place where an overt act occurs. See U.S. Const. Art. III, § 2, Cl. 3; U.S. Const. Amend. VI. In the instant case, petitioners' burning of the crosses furthered their plan and was essential to achieving its objective. The court of appeals therefore correctly held that petitioners "use[d] fire * * * to commit" the conspiracy offense.[4]

c. Petitioners' reliance (98-1024 Pet. 8; 98-6523 Pet. 8) on the rule of lenity is misplaced. As this Court noted in *United States* v. *Wells*, 519 U.S. 482 (1997), "[t]he rule of lenity applies only if, after seizing everything from which aid can be derived, [the Court] can make no more than a guess as to what Congress intended." *Id.* at 499 (citations, ellipsis, and internal

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[4] Like the petitioners in this case, the defendants in *Hayward* argued that "[s]ince the federal felony of conspiracy, under 18 U.S.C. § 241, is complete at the time that the agreement is made, the use of fire in the case at bar gives no vitality to the commission of the conspiracy. The fire was not an aid in formulating the agreement." 6 F.3d at 1248 n.9. The court of appeals in *Hayward* declined to address the argument because it had not been raised in the district court. *Ibid.* Petitioners cite no decision, and we are aware of none, holding that fire cannot be used to commit a conspiracy offense.

quotation marks omitted). Because petitioners used fire in the commission of the predicate civil rights offenses, and because those offenses are felonies prosecutable in courts of the United States, petitioners' conduct is covered by the unambiguous language of Section 844(h)(1).

2. Petitioners contend (98-1024 Pet. 15-18; 98-6523 Pet. 13-16) that the application of 18 U.S.C. 844(h)(1) to this case violated their First Amendment rights. Because petitioners failed to present that argument to the district court, the court of appeals correctly held that the claim was reviewable only for "plain error or fundamental miscarriage of justice." 98-1024 Pet. App. 4. Application of the plain error standard would make this case an unsuitable vehicle for resolution of the question presented even if that question otherwise warranted this Court's review. In any event, petitioners' First Amendment claims are wholly without merit.

Section 241 does not prohibit all expressions of racial animus; it applies to conspiracies "to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." 18 U.S.C. 241. It is well established that the First Amendment does not protect threats and intimidation. See *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 388 (1992) ("threats of violence are outside the First Amendment"); *Rankin* v. *McPherson*, 483 U.S. 378, 386-387 (1987) ("a statement that amounted to a threat to kill the President would not be protected by the First Amendment"). Cf. *Boos* v. *Barry*, 485 U.S. 312, 325-329 (1988) (suggesting that a federal statute prohibiting activity undertaken to "intimidate, coerce, threaten or harass" a foreign official satisfied the First

Amendment).[5] Because petitioners disavow any challenge to the sufficiency of the evidence (see 98-1024 Pet. 2; 98-6523 Pet. 2) and do not contest the propriety of the instructions given to the trial jury, application of Section 241 to this case creates no risk of suppression of constitutionally protected expressive conduct.

Petitioners contend (98-1024 Pet. 17-18; 98-6523 Pet. 15-16) that Section 844(h)(1) is unconstitutional as applied to this case because its effect is that threats communicated through the use of fire will be punished more severely than purely verbal threats. That argument is without merit. While the burning cross may be the harbinger of further violence, it is also dangerous in its own right, for fires do not act predictably. The fire set for the purpose of intimidating the victim may ultimately burn down the neighborhood. Congress reasonably determined that felonies (including the threats and intimidation proscribed by Section 241) should be regarded as particularly blameworthy when they are accomplished through the use of fire, with its attendant destructive potential. Even in the rare case where fire is employed as a means of communicating a message, its use poses serious dangers separate and distinct from its communicative element. Application of Section 844(h)(1) to petitioners' conduct therefore does not impermissibly punish them "based on the mode of their expression" (98-6523 Pet. 15). Compare

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[5] See also, *e.g.*, *Wisconsin* v. *Mitchell*, 508 U.S. 476, 484-486 (1993) (noting that the Court has repeatedly rejected First Amendment challenges to federal and state statutes prohibiting discrimination on the basis of race and sex); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984) ("acts of invidious discrimination * * * are entitled to no constitutional protection"); *Runyon* v. *McCrary*, 427 U.S. 160, 176 (1976) ("the Constitution places no value on discrimination") (ellipsis omitted).

Wisconsin v. *Mitchell*, 508 U.S. 476, 483 (1993) ("Violence or other types of potentially expressive activities that produce special harms distinct from their communicative impact are entitled to no constitutional protection") (brackets and ellipsis omitted).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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